

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

TONY MABRY.

Petitioner,

Civil No. 08cv965-BEN (LSP)

V.

L. E. SCRIBNER, Warden, et al..

## Respondent.s

## **ORDER REOPENING CASE AND SETTING BRIEFING SCHEDULE**

On May 27, 2008, Petitioner, proceeding pro se, submitted a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

In its June 12, 2008 Order, the Court dismissed this case without prejudice because Petitioner failed to satisfy the filing fee requirement and failed to allege exhaustion of state court remedies. Petitioner was instructed that to have this case reopened he had to satisfy the filing fee requirement and file a First Amended Petition no later than August 1, 2008.

Petitioner has now paid the filing fee and filed a First Amended Petition pursuant to this Court’s Order. Based on this Court’s review of the First Amended Petition, the Court **ORDERS** that this case be reopened. Further, in accordance with Rule 4 of the rules governing petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and upon a preliminary review of the First Amended Petition (hereinafter “Petition”), **IT IS ORDERED** that:

1. The Clerk of this Court shall promptly (a) serve a copy of the Petition and a copy of this Order on the Attorney General for the State of California, or his authorized agent; and

1 (b) serve a copy of this Order on Petitioner.

2       2. If Respondent contends the Petition can be decided without the Court's reaching  
 3 the merits of Petitioner's claims (e.g., because Respondent contends Petitioner has failed to  
 4 exhaust any state remedies as to any ground for relief alleged in the Petition, or that the Petition  
 5 is barred by the statute of limitations, or that the Petition is subject to dismissal under Rule 9 of  
 6 the Rules Governing § 2254 Cases, or that all of the claims are procedurally defaulted, or that  
 7 Petitioner is not in custody), Respondent shall file a motion to dismiss pursuant to Rule 4 of the  
 8 Rules Governing § 2254 Cases no later than **September 15, 2008**. The motion to dismiss shall  
 9 not address the merits of Petitioner's claims, but rather shall address all grounds upon which  
 10 Respondent contends dismissal without reaching the merits of Petitioner's claims is warranted.<sup>1</sup>  
 11 At the time the motion to dismiss is filed, Respondent shall lodge with the Court all records  
 12 bearing on Respondent's contention in this regard. A hearing date is not required for the motion  
 13 to dismiss.

14       3. If Respondent files a motion to dismiss, Petitioner shall file his opposition, if any,  
 15 to the motion no later than **October 6, 2008**. At the time the opposition is filed, Petitioner shall  
 16 lodge with the Court any records not lodged by Respondent which Petitioner believes may be  
 17 relevant to the Court's determination of the motion.

18       4. Unless the Court orders otherwise, Respondent shall not file a reply to Petitioner's  
 19 opposition to a motion to dismiss. If the motion is denied, the Court will afford Respondent  
 20 adequate time to respond to Petitioner's claims on the merits.

21       5. If Respondent does not contend that the Petition can be decided without the Court  
 22 reaching the merits of Petitioner's claims, Respondent shall file and serve an answer to the  
 23 Petition, as well as points and authorities in support of such answer, no later than **September**  
 24 **29, 2008**. At the time the answer is filed, Respondent shall lodge with the Court all records  
 25 bearing on the merits of Petitioner's claims. The lodgments shall be accompanied by a notice  
 26 of lodgment which shall be captioned "**Notice of Lodgment in 28 U.S.C. § 2254 Habeas**

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 28       <sup>1</sup> If Respondent contends Petitioner has failed to exhaust any state remedies as to any ground for relief alleged in  
 the Petition, the motion to dismiss shall also specify the state remedies still available to Petitioner.

1     **Corpus Case — To Be Sent to Clerk's Office.**" Respondent shall not combine separate  
 2     pleadings, orders or other items into a combined lodgment entry. Each item shall be numbered  
 3     separately and sequentially.

4         6.     Petitioner may file a traverse to matters raised in the answer no later than **October**  
 5     **29, 2008.** Any traverse by Petitioner (a) shall state whether Petitioner admits or denies each  
 6     allegation of fact contained in the answer; (b) shall be limited to facts or arguments responsive  
 7     to matters raised in the answer; and (c) shall not raise new grounds for relief that were not  
 8     asserted in the Petition. Grounds for relief withheld until the traverse will not be considered.  
 9     No traverse shall exceed ten (10) pages in length absent advance leave of Court for good cause  
 10    shown.

11         7.     A request by a party for an extension of time within which to file any of the  
 12    pleadings required by this Order should be made in advance of the due date of the pleading, and  
 13    the Court will grant such a request only upon a showing of good cause. Any such request shall  
 14    be accompanied by a declaration under penalty of perjury explaining why an extension of time  
 15    is necessary.

16         8.     Unless otherwise ordered by the Court, this case shall be deemed submitted on the  
 17    day following the date Petitioner's opposition to a motion to dismiss and/or his traverse is due.

18         9.     Every document delivered to the Court must include a certificate of service  
 19    attesting that a copy of such document was served on opposing counsel (or on the opposing  
 20    party, if such party is not represented by counsel). Any document delivered to the Court without  
 21    a certificate of service will be returned to the submitting party and disregarded by the Court.

22         10.    Petitioner shall immediately notify the Court and counsel for Respondent of any  
 23    change of Petitioner's address. If Petitioner fails to keep the Court informed of where Petitioner

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1 may be contacted, this action will be subject to dismissal for failure to prosecute.

2 **IT IS SO ORDERED.**

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4 DATED: August 1, 2008

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Hon. Leo S. Papas  
U.S. Magistrate Judge